Supreme Court, U.S.
FILED

001361 FEB 27 2001

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No. _____

In The

Supreme Court of the United States

JACK KEVORKIAN,

Petitioner,

v.

AMERICAN MEDICAL ASSOCIATION, M. ROY SCHWARZ, M.D., JAMES S. TODD, M.D., MARK T. WOLFE, KIRK B. JOHNSON, MICHIGAN STATE MEDICAL SOCIETY AND WILLIAM E. MADIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI

BENDURE & THOMAS
MARK R. BENDURE (P23490)*
Attorneys for Petitioner
577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

DID THE MICHIGAN COURT OF APPEALS CORRECTLY FIND THE RESPONDENTS IMMUNE FROM POTENTIAL DEFAMATION LIABILITY UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER JACK KEVORKIAN IS "LIBEL-PROOF" OR ALTERNATIVELY BECAUSE THE STATEMENTS THAT ACCUSE HIM OF BEING "A KILLER" ARE PROTECTED OPINION?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here, appear in the caption of the case.

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OPINIONS AND ORDERS BELOW

Respondents' pre-trial motion to dismiss was heard on June 14, 1996 in the State of Michigan's Wayne County Circuit Court. On May 21, 1997, the trial court issued an unreported opinion and order denying Respondents' motions for summary disposition. The opinion and order is set forth in the Appendix at App. 33. Respondents were granted interlocutory leave to appeal to the Michigan Court of Appeals. On August 6, 1999, the Michigan Court of Appeals issued its split two to one decision that reversed the trial court's denial of the motion for summary disposition. That opinion is reported at 237 Mich. App. 1; 602 N.W.2d 233 (1999) and is set forth in the Appendix at App. 1.

Petitioner appealed to the Michigan Supreme Court, the State's court of last resort. The Michigan Supreme Court denied leave in a three to two order entered on May 23, 2000. The order is reported at 462 Mich. 862, 613 N.W.2d 720 (2000) and is set forth in the Appendix at App. 37. Petitioner's motion for reconsideration was denied by order entered on November 29, 2000. That order has not yet been reported, but it is set forth in the Appendix at App. 39.

SUPREME COURT JURISDICTION

Following the decision of the Michigan Court of Appeals, Petitioner filed a timely application for leave to appeal to the Michigan Supreme Court under M.C.R. 7.302(C)(2)(b) on August 25, 1999. After the Michigan Supreme Court's May 23, 2000 leave denial, Petitioner

filed a timely motion for reconsideration pursuant to M.C.R. 7.313(E). The motion for reconsideration was denied on November 29, 2000.

Petitioner invokes that certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This Petition, filed within 90 days of the Michigan Supreme Court Order denying reconsideration, is timely under this Court's Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Supremacy Clause, First Amendment, and Fourteenth Amendment of the Constitution of the United States. These provisions state:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[Article VI, ¶ 2]

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[First Amendment]

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[Fourteenth Amendment, § 1]

STATEMENT OF THE CASE

This Petition challenges the propriety of Respondents' publication and distribution of statements about Petitioner, Jack Kevorkian, a man described in the Michigan Court of Appeals opinion in this case as "possibly the best known and most controversial proponent of assisted suicide" (App. 1).

On October 10, 1995 Respondent Kirk B. Johnson acting in his capacity as Group Vice President of Health Policy Advocacy for Respondent American Medical Association ("AMA") wrote on AMA stationery to Attorney General Frank Kelley of the State of Michigan stating that Petitioner:

> "perverts the ideal of the caring and committed physician;"
>
> "serves merely as a reckless instrument of death;"
>
> "poses a great threat to the public;" and,
>
> engages in unspecified "criminal practices." (Complaint, Exhibit A: App. 27).

This letter was also disseminated to Respondent Michigan State Medical Society ("MSMS") and Respondent William E. Madigan, its Executive Director. They, in turn, published these statements to MSMS members and other third parties (Complaint ¶¶ 25-26: App. 24-25).

On November 9, 1995, Respondent AMA, its Executive Vice President James S. Todd, M.D. and Respondent Mark T. Wolfe, its Public Information Officer, issued a news release that alleged "continued killings" and "criminal activities" by Petitioner (Complaint, Exhibit B: App. 29). On November 11, 1995, Respondent M. Roy Schwarz, the AMA's Group Vice President for Professional Standards was quoted in a Detroit Free Press article alleging that Petitioner was "a killer" (Complaint, Exhibit C: App. 31).

On February 9, 1996, Petitioner filed suit in Wayne County Circuit Court, the Michigan Court of general

jurisdiction (Complaint: App. 20). The Complaint alleged defamation by publication of "false, slanderous and/or libelous statements . . . throughout Wayne County and the United States, including news print, magazines, radio, television, on-line services, and other means, with injurious consequences" to Petitioner (Complaint ¶ 24: App. 24). The Complaint further alleged that despite a demand for retraction, Respondents refused to issue an appropriate retraction (Complaint ¶ 29: Ap. 25). With respect to damages, the Complaint alleged "damage to [Petitioner's] reputation, humiliation, embarrassment, mental pain and anguish, indignation and outrage" including exemplary and punitive damages under M.C.L. 600.2911; M.S.A. 27A.2911 (Complaint ¶¶ 30-31 *et seq.*: App. 25-26).

In lieu of filing an Answer, Respondents moved to dismiss under M.C.R. 2.116(C)(8), asserting that the pleadings failed to state a claim upon which relief could be granted. Respondents contended that the statements constituted opinion on matters of public interest and not statements of fact about the Petitioner. Respondents asserted that the statements are protected under U.S. Const. amend. I and Mich. Const. 1963, art. 1, § 5.

Hearing on the motion occurred in the Wayne County Circuit Court on June 14, 1996 before the Honorable Sharon Tevis Finch. On May 21, 1997, the judge issued her opinion and order denying summary disposition. The judge found that the statements about Petitioner "are indeed statements of fact, not mere opinion, and their gravamen is that [Petitioner] is a 'criminal' who 'kills' 'victims' " (Opinion: App. 34). Stating that it is not necessary to issue a press release to communicate with

the government, the judge rejected Respondents' claims that the statements were constitutionally privileged (Opinion: App. 35). The judge also rejected Respondents' assertion that their First Amendment rights are violated because: "the First Amendment does not guarantee that one will be safe from suit for libelous statements" and "the speech complained of is not constitutionally protected against this defamation action" (Opinion: App. 36).

The Michigan Court of Appeals granted interlocutory leave, and on August 6, 1999 reversed in a two to one opinion. Judge Joseph B. Sullivan joined by Judge (now Michigan Supreme Court Justice) Stephen J. Markman, held:

> "as a matter of law that the alleged defamatory statements, taken individually or together, taken in or out of context, do not, by implication or otherwise, *considering all the circumstances,* so harm plaintiff's reputation as to lower that reputation in the community or to deter third persons from associating with him" (emphasis in original) (Opinion: App. 13).

The majority found that, as to the issue of assisted suicide, Petitioner "is virtually 'libel proof' " because Petitioner's "reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is de minimis."

Judge Kathleen Jansen dissented (App. 15). She stated that whether plaintiff had engaged in criminal practices or was a killer when the statements were made are provable as false because Petitioner had not been convicted of any crime at the time they were made (App. 17). Further, the dissent reasoned that because the statements are not merely

strongly worded opinions, but actually accuse Petitioner of criminal wrongdoing as a killer or murderer, they are not protected by the First Amendment and therefore set forth an actionable defamation claim (App. 19).

On May 23, 2000, Petitioner's timely application for leave to appeal to the Michigan Supreme Court was denied by a three to two order "because we are not persuaded that the question presented should be reviewed by this Court" (App. 37). On November 29, 2000, Petitioner's motion for reconsideration of that order was denied by the Michigan Supreme Court (App. 39).

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

(1) OVERVIEW

Respondents persuaded the Michigan Court of Appeals that the defamatory publications alleging that Petitioner is a "criminal" or a "killer" are merely expressions of constitutionally protected "opinion", even if they were published with knowledge of falsity. However, there is no constitutional protection for false statements or accusations of criminal conduct or wrongdoing. Lies cannot be cloaked by the shield of "opinion" when published with knowledge of falsity. As the trial court correctly recognized:

> "In this instance, the true topic of public concern is the issue of assisted suicide and its permissibility, not whether or not Plaintiff is a 'criminal.' " (App. 34-35).

Here, Respondents did not simply express constitutionally protected opinions about a hotly debated public controversy. Instead, they made defamatory statements about Petitioner that are entitled to no First Amendment protection.

This Court should grant certiorari to examine whether under, the First Amendment, an individual who is not a convicted or admitted criminal can nonetheless become "libel-proof" on the theory that his reputation is already so low that it is not worthy of putting those who defamed him to the costs of defending against the libel because it so "chills" their right to freedom of expression.

This Court should also grant certiorari to consider whether, under the First Amendment, statements that falsely accuse Petitioner of being a "criminal" or a "killer" are protected opinion or actionable defamation.

(2) LEGAL BACKDROP

Petitioner concedes that he is a public figure. Therefore, the principles articulated in *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) apply and Petitioner must ultimately prove by clear and convincing evidence that the publication was a defamatory falsehood made with actual malice, *i.e.*, with knowledge of falsity or with reckless disregard for the truth.

Statements of opinion involving objectively verifiable statements of fact may be actionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). However, some statements of opinion which,

viewed in context, amount to no more than "rhetorical hyperbole" or "vigorous epithet" are not actionable. *Id.* at 20-21, *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) [newspaper reports that community members described plaintiff's bargaining position at meetings as "blackmail," not equivalent to charging crime of blackmail].

And, while in *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 12 L.Ed.2d 125 (1964), the Court said that "[t]ruth may not be the subject of either civil or criminal sanction where discussion of public affairs is concerned," in *Gertz v. Robert Welch*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), citing *New York Times Co. v. Sullivan, supra* at 270, the Court reminded that "there is no constitutional value in false statements of fact" because "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."

(3) THE QUESTION OF WHETHER PETITIONER IS "LIBEL-PROOF" PRESENTS A SUBSTANTIAL CONSTITUTIONAL ISSUE.

This defamation suit was dismissed on the dubious theory that Petitioner's reputation is already so low that it is not worth the potential chill to Respondents' First Amendment right to freedom of expression which they would incur from the costs of defending against the claim of libel. Seizing upon several federal court decisions and acting under the mistaken impression that it was applying federal constitutional law, the Michigan Court of Appeals sought to avoid inquiry into the issue of whether

Respondents' statements are protected opinion or actionable defamation by finding Petitioner "libel-proof" as a matter of law. Quoting from *Brooks v. American Broadcasting Co., Inc.*, 932 F.2d 495, 500 (6th Cir. 1991) and *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2nd Cir. 1986), *cert. den.*, 479 U.S. 1091, 107 S.Ct. 1303, 94 L.Ed.2d 158 (1987), the court found that "with respect to the issue of assisted suicide, [Petitioner] is virtually 'libel proof' . . . "[1] (App. 13). The court held that the statements could not reasonably cause impairment of reputation because Petitioner's reputation is already so low that Respondents should not have to bear the costs of the claim of libel "which can themselves impair vigorous freedom of expression . . . " (App. 13). The court further found that Petitioner's "reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is de minimus" and that "the effect of [Respondents'] statements . . . would be just as likely to result in third persons seeking [Petitioner] out rather than deterring them from associating with [Petitioner] (App. 14).

The "libel-proof" plaintiff doctrine, which is a creation of the federal courts, has never before been so broadly applied. The court quoting *Brooks, supra*, admits that the libel-proof doctrine is "a rather loose-woven legal conception of the federal courts" (App. 13). The libel-proof plaintiff doctrine and its two permutations, the

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[1] The court stated that its knowledge of Petitioner's subsequent convictions for second-degree murder and delivering a controlled substance without a medical license did not affect its review of the trial court's 1997 decision in this case.

*substantial truth doctrine and the incremental harm doc*trine are defenses that seek to defeat a libel action at an early stage. *See generally,* Note, *The Libel-Proof Plaintiff Doctrine,* 98 Harv. L. Rev. 1909 (1985); Serra, *New Criticisms of the Libel-Proof Plaintiff Doctrine,* Wayne M. 46 Clev. St. L. Rev. 1 (1998); Note, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, And The Future Of The Incremental Harm Doctrine,* 73 N.Y.U.L. Rev. 529 (1998).

Neither the cases cited by the court in this case nor any other case have applied the libel-proof plaintiff doctrine to a plaintiff, who at the time the statements were published, had not been convicted of any crime, let alone murder. In *Brooks,* after discussing the libel-proof plaintiff doctrine, the Sixth Circuit declined to apply it to the plaintiff despite the fact that his criminal history included convictions for breaking and entering, grand larceny, first-degree manslaughter, and carrying a concealed weapon under disability *Id.* at 497, 501-502. In *Guccione v. Hustler Magazine, Inc., supra,* the Second Circuit reversed a jury verdict because the allegation that plaintiff was an adulterer was true or substantially true and therefore plaintiff was libel-proof with respect to his reputation as an adulterer. Similarly, in *Mattheis v. Hoyt,* 136 F. Supp. 119 (D. Mich. 1955), the partially untrue statement that plaintiff had confessed to murder that was made after his murder conviction, did not change the substantial truth so as to damage his reputation. See also: *Noth v. Evening News Ass'n,* 338 Mich. 359, 362, 61 N.W.2d 1 (1953) [plaintiff's admission to killing made statement that he had been convicted of murder substantially true even though conviction was for manslaughter]. None of these cases relied upon by the court below support the application of

the libel-proof plaintiff doctrine as a matter of federal constitutional law.

This Court has expressly held that application of the closely related incremental harm doctrine is not compelled as a matter of First Amendment protection of speech. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). The lower federal courts have been skeptical and downright critical of the libel-proof plaintiff doctrine. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-1569 (D.C. Cir. 1984), vacated and rev'd on other grds, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), now Justice Antonin Scalia scathingly critiqued the libel-proof plaintiff and incremental harm doctrines. As to the theory that a plaintiff has such a poor reputation that it cannot be damaged, he opined that he could not envision "how a court would go about determining that someone's reputation had already been 'irreparably' damaged – *i.e.*, that no new reader could be reached by the freshest libel." Rejecting the assumption that one's reputation is a monolith, which stands or falls in its entirety, Justice Scalia opined that "[e]ven the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential."

Recently in *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348 (S.D. N.Y. 1998), the court refused to conclude, as a matter of law, that the damage that flowed from the allegedly defamatory statements was only incrementally greater than the harm that flowed from the fact that plaintiff was a suspect and was actively investigated by the authorities in the Atlanta Olympics bombing case. In the most analogous case to the present facts, *Sharon v. Time, Inc.*, 575

F. Supp. 1162, 1168-1171 (S.D. N.Y. 1983), the court again refused to apply the libel-proof doctrine. In *Sharon*, Time magazine published an article reporting that the Kahan Commission, a group appointed by the State of Israel to investigate the murders of Palestinians at two refugee camps, had found then former Israeli Minister of Defense Sharon indirectly responsible for the murders. *Id.* at 1164. Sharon sued, alleging that the article was libelous because it accused him of knowingly permitting or encouraging murder. *Id.* at 1163. The court refused to apply the libel-proof plaintiff doctrine, citing the difference between criminal and non-criminal moral standards:

> "The effects on Sharon's reputation of determinations based on such premises cannot as a matter of law be equated with the effects normally imputed to verdicts in criminal cases. Verdicts rendered in criminal cases, that have led courts to find some convicted defendants libel proof to further claims of wrongdoing, rest upon the application of conventional standards of legal responsibility, rather than the standards, rooted in Deuteronomy and in the special sufferings of the Jewish people, which informed the Commission's perspectives." *Id.* at 1171.

See also: *Buckley v. Littell*, 539 F.2d 882, 888-889 (2nd Cir. 1976) [discussing impropriety of equating controversial reputation within political circles with reputation based on criminal convictions].

The Michigan Court of Appeals decision in this case represents a major departure from First Amendment law. The First Amendment right to freedom of expression is in

a head-on collision with the right to protect one's reputation. The decision below raises substantial First Amendment questions.

(4) THE QUESTION WHETHER STATEMENTS THAT FALSELY ACCUSE PETITIONER OF BEING A "CRIMINAL" AND A "KILLER" ARE PROTECTED OPINION OR ACTIONABLE DEFAMATION PRESENTS A SUBSTANTIAL CONSTITUTIONAL ISSUE.

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), this Court held that no separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The Court then held that a reasonable factfinder could conclude that statements implying an assertion that Milkovich perjured himself in a judicial proceeding were defamatory. The Court said that the statements under scrutiny were not "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury". *Id.*

Here, after recognizing that the present case involves the collision of the two competing legal regimes of libel and constitutional law, the Michigan Court of Appeals majority cited and discussed *Milkovich*, but then misapplied these case holdings. The majority said that even if it was to conclude that the Respondents' statements:

> " . . . are defamatory, state objectively verifiable facts about plaintiff, and are provable as false, we would find that with respect to this highly public plaintiff and the facts of this case which

> are nothing if not matters of public concern, because the statements also are necessarily subjective and could also be reasonably understood as not stating actual facts, they are either nonactionable rhetorical hyperbole or must be accorded the special solicitude reserved for protected opinion." (App. 14-15).

However, as recognized by the dissent and by the trial court in the first instance, the statements directed toward Petitioner are provable as false because Petitioner had not been convicted of any crime at the time the statements were made and they involved objectively verifiable events. They are statements that actually accuse Petitioner of being a "criminal" and a "killer," are not statements involving the "sort of loose, figurative, or hyperbolic language" tending to negate that the Respondents were seriously asserting that Petitioner is a murderer.

Such false statements of fact and accusations or inferences of criminal conduct are not protected as opinion. Petitioner would be among the first to acknowledge the right of anyone to express their opinions on assisted suicide in good faith. He welcomes fair comment and criticism and public debate on this important issue. This is really the crux of the case. Petitioner has alleged and should be entitled to prove that the Respondents crossed the defamation line by knowingly falsely asserting that Petitioner is a "criminal" and a "killer" because he is a well known proponent of assisted suicide.

Respondents did not merely "suggest" or "imply" criminal conduct by Petitioner. They directly accused him of being a "killer" engaged in continuing "criminal"

activity. Respondents refer to specific events, *i.e.*, "the death of Dr. Jack Kervorkian's 26th victim, and the questionable circumstances surrounding the situation . . . " (App. 29). These are not protected expressions of opinion, but rather serious allegations of the commission of a crime.

Nor are Respondents' statements protected by the doctrine of "fair comment" that should be accorded "special solicitude" as matters of such urgent public concern. There is no case in American jurisprudence which characterizes malicious falsehoods as "fair comment." Assuming as the Complaint asserts that the publications were made with knowledge of falsity, there is simply no constitutional protection for such false statements of fact. As this Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974):

> "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co. v Sullivan*, 376 U.S. at 270, 845 S.Ct. 710, 11 L.Ed.2d 686 (1964). They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

The Michigan Court of Appeals committed a serious constitutional misstep when it held that Respondents' statements are insulated from the law of defamation by

First Amendment considerations. The decision raises substantial First Amendment questions and the need for this Court's intervention cannot be ignored.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition for Writ of Certiorari and correct a serious injustice which has precluded him from having his defamation claim heard on its merits.

Respectfully submitted,

BENDURE & THOMAS
MARK R. BENDURE (P23490)
Attorneys for Petitioner
577 East Larned, Suite 210
Detroit, Michigan 48226-4392
(313) 961-1525

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MICHIGAN COURT OF APPEALS

KEVORKIAN v. AMERICAN MEDICAL ASSOCIATION

Docket Nos. 203985, 204049. Submitted January 6, 1999, at Detroit. Decided August 6, 1999, at 9:05 a.m. Leave to appeal sought.

Jack Kevorkian brought an action in the Wayne Circuit Court against the American Medical Association, the Michigan State Medical Society, and others, alleging that he was defamed by the defendants' publication or republication of written statements that the plaintiff, a well-known proponent of "assisted suicide," "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practices." The defendants moved for summary disposition, arguing that because the statements were constitutionally protected expressions of opinion, the plaintiff had failed to state a claim on which relief could be granted. The court, Sharon Tevis Finch, J., denied the defendants' motions, ruling that the statements were statements of fact and therefore not constitutionally protected and that they constituted libel per se because referring to the plaintiff as both a criminal and a killer could lead to the inference that he was a murderer. The defendants appealed by leave granted, and their appeals were consolidated.

The Court of Appeals *held*:

1. The statements at issue are not defamatory. As a matter of law, the alleged defamatory statements, taken individually or together, taken in or out of context, do

not, by implication or otherwise, considering all the circumstances, so harm the plaintiff's reputation as to lower that reputation in the community or to deter third persons from associating with him. The plaintiff's reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is de minimis. The effect of the defendants' statements would be just as likely to result in third persons seeking the plaintiff out rather than deterring them from associating with him.

2. Even if the statements are defamatory, they are not actionable because they are subjective and could also be reasonably understood as not stating actual facts about the plaintiff. The statements are either nonactionable rhetorical hyperbole or must be accorded the special solicitude reserved for constitutionally protected speech of public concern and about a public figure.

Reversed and remanded for entry of judgment for the defendants.

JANSEN, J., dissenting, stated that the defendants' statements are not expressions of opinion that are protected from an action for defamation, but may be false statements of fact that lead to an inference of criminal conduct or wrongdoing. An accusation of a commission of a crime is defamatory per se, meaning that it is actionable without proof of special harm or loss of reputation. The trial court did not err in denying the motions for summary disposition because the questions whether the statements are actually false, defamatory, and made with

the knowledge that they were false or with reckless disregard of whether they were false are properly for the finder of fact to determine.

1. Libel and Slander – Defamatory Communications.

A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual.

2. Libel and Slander – Actions.

Statements that are factual on their face and provable as false are not actionable as defamation where they cannot be interpreted by a reasonable person as stating actual facts about the plaintiff; statements must be viewed in context to determine whether they are capable of defamatory interpretation, or whether they constitute no more than rhetorical hyperbole or vigorous epithet.

3. Libel and Slander – Actions – Public Figures.

A plaintiff establishes a defamation claim regarding a statement that is not protected by the First Amendment by showing a false and defamatory statement concerning the plaintiff, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication

(defamation per quod); where the plaintiff is a public figure, the plaintiff must prove by clear and convincing evidence that the publication was a defamatory falsehood and was made with actual malice, i.e., with knowledge of falsity or with reckless disregard for the truth (US Const., Am I).

4. Libel and Slander – Actions.

A court in an action for defamation may decide as a matter of law whether a statement is actually capable of defamatory meaning and may grant summary disposition where no such meaning is possible.

5. Libel and Slander – First Amendment – Public Figures – Speech of Public Concern.

The first Amendment accords maximum protection to public speech about public figures, with a special solicitude for speech of public concern.

6. Libel and Slander – Defamation by Implication.

A cause of action for defamation by implication exists in Michigan; a plaintiff alleging defamation by implication must prove that the defamatory implication is materially false.

Fieger, Fieger & Schwartz, P.C. (by *Geoffrey Nels Fieger* and *William J. McHenry*), for Jack Kevorkian.

Butzel Long (by *Richard E. Rassel, James E. Stewart,* and *Laurie J. Michelson*) and *Sidley & Austin* (by *Jack R. Bierig,*

Richard J. O'Brien, and *Erie S. Mattson*), for American Medical Association and others.

Kerr, Russell and Weber, P.L.C. (by *Richard D. Weber, Patrick McLain*, and *Patrick J. Haddad*), for Michigan State Medical Society and William E. Madigan.

Before: MARKMAN, P.J. and JANSEN and J. B. SULLIVAN*, JJ.

J. B. SULLIVAN, J. Defendants American Medical Association (AMA); M. Roy Schwarz, M.D.; James S. Todd, M.D.; Mark T. Wolfe; Kirk B. Johnson; Michigan State Medical Society (MSMS); and William E. Madigan were granted leave to appeal from the trial court's denial of their motions for summary disposition pursuant to MCR 2.116(C)(8). We reverse and remand.

On February 9, 1996, plaintiff Jack Kevorkian, possibly the best known and most controversial proponent of assisted suicide, filed suit against defendants, alleging that he had been defamed. Specifically, plaintiff claimed that on October 10, 1995, defendant Johnson, acting as general counsel on behalf of defendant AMA, published a letter to Michigan Attorney General Frank Kelley and to defendants Madigan and MSMS stating that plaintiff "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practices." Plaintiff further alleged that defendants Todd and Wolfe, defendant AMA's executive vice president and public information officer, respectively,

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

issued a news release alleging "continued killings" and "criminal activities" by plaintiff. Plaintiff also alleged that defendant Schwarz, defendant AMA's vice president for professional standards, published false and defamatory statements to the media calling plaintiff "a killer." Finally, plaintiff alleged that defendants MSMS and its executive director, defendant Madigan, published and distributed the statements made by the other defendants.

All defendants moved for summary disposition, arguing that the statements were constitutionally protected expressions of opinion. Plaintiff argued that false statements of fact and accusations of criminal conduct are not constitutionally protected as opinions. On May 21, 1997, the trial court entered its opinion and order denying defendants' motions. The trial court concluded that the statements at issue were statements of fact and therefore not constitutionally protected, and that they constituted libel per se because referring to plaintiff as both a criminal and a killer in the same document could lead to the inference that plaintiff was a murderer.

This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 N W 2d 725 (1998). MCR 2.116(C)(8) permits summary disposition when a plaintiff has failed to state a claim on which relief can be granted; a motion pursuant to MCR 2.16(C)(8), therefore determines whether the plaintiff's pleadings allege a prima facie case. *Garvelink v Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). The motion may be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*, p 608. When

addressing defamation claims, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression. *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). Summary disposition is an essential tool in the protection of First Amendment rights. *Id.*, n 4.

A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual. *Ireland, supra*, p 619, citing *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985). However, not all defamatory statements are actionable. *Ireland, supra*, p 614. For example, the United States Supreme Court has rejected the idea that all statements of opinion are protected and has directed that the defamatory statement must be provable as false to be actionable. *Id.*, p 616, citing *Milkovich v Lorain Journal Co.*, 497 US 1, 17-20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). In *Milkovich*, the Court by way of example distinguished the actionable statement, "In my opinion Mayor Jones is a liar," from the nonactionable statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." *Ireland, supra*, p 616. The Court apparently intended to distinguish between an objectively verifiable event in the former case and a subjective assertion in the latter. *Id.*, citing *Milkovich, supra*, pp. 21-22. Similarly, in *Ireland*, we concluded that the statement that plaintiff Ireland was not a fit mother was necessarily subjective and was therefore not actionable. *Id.*, p 617. We note, however, that a statement may be necessarily subjective and also be objectively verifiable. A

statement that plaintiff is a murderer, which the trial court found to be implied from defendant's statements, falls into that category.

The Supreme Court has also determined that defamatory statements, in order to be actionable, must state actual facts about a plaintiff, thereby protecting statements that, although factual on their face and provable as false, could not reasonably be interpreted as stating actual facts about the plaintiff. *Ireland, supra,* p 617, citing *Milkovich, supra,* pp. 16-17, and *Hustler Magazine, Inc v Falwell,* 485 US 46, 50; 108 S Ct 876; 99 L Ed 2d 41 (1988). Generally included as such protected speech are parodies, political cartoons, and satires. *Ireland, supra,* p 617, citing *Garvelink, supra,* p 610. In *Ireland,* we concluded that the statement that Ireland "never" spent time with her child was patently false and an obvious expression of disapproval of the amount of time Ireland spent with her child, but that no reasonable person would believe the statement stated actual facts about Ireland. *Ireland, supra,* p 619. However, it is also clear that two completely conflicting statements can "state actual facts" about an individual. In other words, plaintiff's acts of assisted suicide, for example, can be described as murder or mercy, and any reasonable person could understand that both *or neither* could be taken as stating actual facts about plaintiff.

The Supreme Court has further recognized that statements must be viewed in context to determine whether they are capable of defamatory interpretation, or whether they constitute no more than "rhetorical hyperbole" or "vigorous epithet." *Ireland, supra,* p 618, citing *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler,* 398 US 6, 14; 90

S Ct 1537; 26 L Ed 2d 6 (1970). Thus, some expressions of opinion are protected. *Ireland, supra,* p 614, citing *Milkovich, supra,* pp. 18-20; *Hodgins v Times Herald Co.,* 169 Mich App 245, 253; 425 NW2d 522 (1988), citing *Gertz v Robert Welch, Inc,* 418 US 323, 339; 94 S Ct 2997; 41 L Ed 2d 789 (1974). For example, in *Greenbelt, supra,* a real estate developer was involved in simultaneous negotiations with the city of Greenbelt, Maryland. Because the developer was both selling land to the city and seeking a zoning variance from the city, a local newspaper printed articles reporting that community members described his bargaining position as "blackmail." The Supreme Court rejected the developer's argument that the newspaper effectively charged him with the crime of blackmail, and concluded that "even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole. . . . " *Ireland, supra,* p 618, citing *Greenbelt, supra,* p 14. In *Hodgins, supra,* p 254, referring to *Greenbelt, supra,* we noted that "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime." Into this category, we would place statements that are both necessarily subjective and objectively verifiable, and statements that both do and do not state actual facts about a person.

Statements that are not protected and therefore are actionable include false statements of fact, i.e., those that state actual facts but are objectively provable as false, and direct accusations or inferences of criminal conduct. *Hodgins, supra,* p 253. Language that accuses or strongly implies that someone is involved in illegal conduct

crosses the line dividing strongly worded opinion from accusation of a crime. *Id.*, p 254. Indeed, this Court has stated that an accusation of the commission of a crime is defamatory per se, meaning that special harm need not be proved. *Wilkerson v Carlo*, 101 Mich App 629, 632; 300 NW2d 658 (1980). Cf. 1994 Det Col L R 61, 76-77, 100-112, and cases cited therein (while the doctrine of libel per se has some tangential relevance to the issue of defamatory meaning, in a strict sense it is most relevant to the requirements governing the pleading of damages).

Where a defendant's statements are not protected by the First Amendment, a plaintiff can establish a defamation claim by showing (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Hawkins, supra*, p 325; *Ireland, supra*, p 614. Where a public figure is involved in a defamation case, the public figure must prove by clear and convincing evidence that the publication was a defamatory falsehood and was made with actual malice, i.e., with knowledge of falsity or with reckless disregard for the truth. *Hawkins, supra*, p 331, n 10, citing *Masson v New Yorker Magazine, Inc*, 501 US 496; 111 S Ct 2419; 115 L Ed 2d 447 (1991); *Garvelink, supra*, p 608 citing *New York Times v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964). A court may determine, as a matter of law, whether a statement is actually capable of defamatory meaning. *Ireland, supra*, p 619.

Where no such meaning is possible, summary disposition is appropriate. *Id.*

Further subtleties and refinements to the basic elements stated above have arisen as the "[t]wo competing legal regimes [of libel and constitutional law] collide. . . . " *Locricchio v Evening News Ass'n*, 438 Mich 84, 88; 476 NW2d 112 (1991), cert den 503 US 907; 112 S Ct 1267; 117 L Ed 2d 495 (1992). In *Hawkins, supra*, p 325, this Court noted that the public or private character of the speech must be considered. Regarding that, the Court in *Locricchio* stated that the United States Supreme Court "has most consistently interpreted the First Amendment to accord maximum protection to public speech about public figures . . . [with a] special solicitude for speech of public concern." *Id.*, pp 118, 120 (citations omitted).

In *Hawkins, supra*, pp. 332-333, this Court discussed the "substantial truth doctrine," which states that a statement or defamatory implication need only be substantially accurate as opposed to being literally and absolutely accurate. See also *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 264; 487 NW2d 205 (1992), cert den 507 US 967; 113 S Ct 1401; 122 L Ed 2d 774, reh den 507 US 1047; 113 S Ct 1891; 123 L Ed 2d 507 (1993) (numerous courts have rejected claims of falsity when based on a misuse of formal legal terminology by nonlawyers). In *Hawkins, supra*, p 334, this Court reiterated that the issues of falsity and fault were to be examined independently, so that whether the statement was made negligently or intentionally was independent of the question of material falsity, to which the substantial truth doctrine is applicable. *Hawkins, supra*, involved a suit for defamation by implication. This Court determined that

such a cause of action exists in Michigan but only if the plaintiff proves that the defamatory implications are materially false. *Id.*, p 332.

In this case, we strongly emphasize that our conclusions are limited strictly to the facts of this case. See *State Farm Mut. Automobile Ins. Co. v Ruuska*, 412 Mich 321, 338; 314 NW2d 184 (1982); *Haukland v Muirhead*, 233 Mich 390, 397, 399; 206 N.W. 549 (1925); *Monusko v Postle*, 175 Mich App 269, 277; 437 NW2d 367 (1989). Second, while we are aware of plaintiff's recent convictions of second-degree murder and delivering a controlled substance without a medical license, those convictions do not affect our instant review of the trial court's 1997 decision to deny defendants' motions for summary disposition in plaintiff's defamation action. Finally, we note without comment that defendant AMA's letter to the Attorney General, in addition to containing the allegedly defamatory statements, also states, "it is ethical for physicians to provide effective pain medication *even if the medication may have the side effect of suppressing respiration and hastening death.*" (Emphasis added.)

In this case, there is no dispute that plaintiff is a public figure. Indeed, more than most in recent memory, plaintiff "voluntarily expose[d] [himself] to the risk of defamation by injecting [himself] into public controversy." *Locricchio, supra*, p 119. Additionally, the parties do not dispute that the issue of assisted suicide is a matter of public concern. Therefore, we must accord maximum protection to defendants' speech about plaintiff, with "special solicitude" for their speech on a matter of such urgent public concern. *Locricchio, supra.*

However, even without that maximum protection and special solicitude, we hold as a matter of law that the alleged defamatory statements, taken individually or together, taken in or out of context, do not, by implication or otherwise, *considering all the circumstances,* so harm plaintiff's reputation as to lower that reputation in the community or to deter third persons from associating with him. *Ireland, supra,* p 619. We find that, with respect to the issue of assisted suicide, plaintiff is virtually "libel proof," which has been defined as "a rather loose-woven legal conception of the federal courts." *Brooks v American Broadcasting Co Inc,* 932 F.2d 495, 500 (CA 6, 1991). In *Brooks,* the Court quoted from an opinion of the Second Circuit Court of Appeals to further define the concept as follows: " '[I]n those instances where an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low . . . the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided.' " *Id.,* p 501, quoting from *Guccione v Hustler Magazine, Inc,* 800 F2d 298, 303 (CA 2, 1986), cert den 479 US 1091; 107 S Ct 1303; 94 L Ed 2d 158 (1987). In *Brooks,* the Court noted that, while criminal convictions are the well-worn path to achieving libel-proof status, a specific reputation obtained through means such as newspapers and magazines also will suffice. *Id.* See also *Mattheis v Hoyt,* 136 F Supp 119 (WD Mich, 1955) (even a partially untrue statement, published after a conviction of murder, did not damage the plaintiff's reputation except possibly among other inmates); *Noth v Evening News Ass'n,* 338

Mich 359, 362; 61 NW2d 1 (1953) (the plaintiff's admission amply justified the defendant's stating that the plaintiff was guilty of murder though convicted only of manslaughter). In short, plaintiff's reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is de minimis. *Brooks, supra,* p 501. Further, we conclude that any effect of defendants' statements, not unlike all the other publicity that generally "spells plaintiff's name right," would be just as likely to result in third persons seeking plaintiff out rather than deterring them from associating with plaintiff. *Ireland, supra.*

In light of our conclusion that the implication that plaintiff is a murderer, which arises from the statements forming the basis of plaintiff's complaint, is not defamatory, plaintiff's other arguments are moot. Notwithstanding plaintiff's creativity at oral argument, we decline plaintiff's invitation to hold as a matter of law that all accusations of criminal activity are automatically defamatory (thereby eliminating the need for that determination by the trial court in the first instance), and we find no merit in plaintiff's related claim that a finding in favor of defendants would in essence preclude criminal prosecution under M.C.L. 750.370; MSA 28.602.

Even if we were to conclude that defendants' statements are defamatory, state objectively verifiable facts about plaintiff, and are provable as false, we would find that with respect to this highly public plaintiff and the facts of this case, which are nothing if not matters of public concern, because the statements also are necessarily subjective and could also be reasonably understood as not stating actual facts, they are either nonactionable

rhetorical hyperbole or must be accorded the special solicitude reserved for protected opinion. *Locricchio, supra.*

Plaintiff's very celebrity (or notoriety, if you will) derives exclusively from his participation in a national debate over the propriety of assisted suicide – whether it is more akin to an act of mercy or to an act of homicide. Having exercised his leadership on behalf of one side of this debate, and having contributed substantially to the awareness of the American people of this debate, it is now more than a little disingenuous for plaintiff to accuse those on the opposite side of this debate of defamation. Such alleged defamation is grounded here in nothing more than the fact that defendants are in disagreement with plaintiff's position: they would characterize plaintiff's conduct differently than plaintiff would characterize it. Where an alleged defamatory statement, occurring in the course of a public debate initiated or perpetuated by plaintiff himself, is focused precisely on a matter lying at the heart of the debate, it is hard to understand how tort law could be implicated. Indeed, it is hard to imagine anything that could more effectively chill legitimate public debate.

Reversed and remanded for entry of judgment for defendants. We do not retain jurisdiction.

MARKMAN, P.J., concurred.

JANSEN, J. (*dissenting*).

I respectfully dissent and would affirm the trial court's order denying defendants' motions for summary disposition.

The alleged defamatory statements have been fully set forth by the majority. The trial court ruled that the gravamen of the statements is that plaintiff is a criminal who kills his victims. The trial court found that the allegation that plaintiff is a criminal and a killer could lead to the inference that he is a murderer, and that such an allegation constitutes libel per se. The trial court went on to rule that the statements are not protected by the First Amendment, and thus denied defendants' motions for summary disposition under MCR 2.116(C)(8).

A defamatory statement is traditionally defined as one that tends to so harm the reputation of persons so as to lower them in the estimation of the community or to deter others from associating or dealing with them. *Locricchio v Evening News Ass'n*, 438 Mich 84, 115; 476 NW2d 112 (1991). A cause of action for defamation includes four elements: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher,[1] and (4) either actionability of the statement regardless of special harm or the existence of special harm caused by the publication. *Id.* at 115-116.

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[1] It is not disputed that plaintiff is a public figure. In such a case, the public figure must prove that the statement was made with actual malice, that is, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not. This showing of actual malice is subject to a "clear and convincing" standard of proof. *Garvelink v Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994).

This case essentially turns on whether the statements made by defendants are held to be expressions of opinion that are protected from a defamation action or are held to be false statements of fact that are not protected from a defamation action. See *Milkovich v Lorain Journal Co.*, 497 US 1, 19; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). Further, this Court has held that direct accusations or inferences of criminal conduct or wrongdoing are not protected as opinion. *Hodgins v Times Herald Co.*, 169 Mich App 245, 253; 425 NW2d 522 (1988). Additionally, an accusation of a commission of a crime is defamatory per se, meaning that it is actionable without proof of special harm or loss of reputation. *Wilkerson v Carlo*, 101 Mich App 629, 632; 300 NW2d 658 (1980); *Tumbarella v Kroger Co.*, 85 Mich App 482, 493; 271 NW2d 284 (1978); see also *In re Thompson*, 162 Bankr. 748 (E D Mich, 1993) (the mother's allegation that the father had sexually abused their minor daughter was defamation per se because the allegation effectively accused the father of committing a crime).

I find the present case to be similar to both *Milkovich* and *Hodgins* where the respective courts found the alleged defamatory statements to be actionable. First, the statements directed toward plaintiff are provable as false because plaintiff had not been convicted of any crime at the time they were made. Thus, whether plaintiff had engaged in criminal practices or was a killer when the statements were made are objectively verifiable events and can be proved as false. See *Ireland, supra* at 616.

Further, the statements are not merely strongly worded opinions, but actually accuse plaintiff of criminal

wrongdoing (as a killer or murderer), and, thus, cross "the line dividing strongly worded opinion from accusation of crime." *Hodgins, supra* at 254. Similarly, in *Milkovich, supra* at 21, the Supreme Court stated the following:

> We are not persuaded that . . . an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the [newspaper] column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.' " . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

Like *Milkovich*, the present case does not involve the "sort of loose, figurative, or hyperbolic language" tending to negate the impression that the defendants were seriously asserting that plaintiff is a murderer. Accordingly, the statements made by the defendants accusing plaintiff of being a killer and of engaging in criminal activities are not protected by the First Amendment.

Therefore, I would hold that the trial court did not err in denying defendants' motions for summary disposition under MCR 2.116(C)(8) because the pleadings,

accepted as true, set forth an actionable defamation claim. Whether the statements are actually false, defamatory, and made with the knowledge that they were false or with reckless disregard of whether they were false is for a factfinder to determine.

I would affirm.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JACK KEVORKIAN, M.D.,

Plaintiff,

Case No. 96-___-NZ
Hon.

vs.

AMERICAN MEDICAL ASSOCIATION; M. ROY SCHWARZ; JAMES S. TODD, M.D.; MARK T. WOLFE; KIRK B. JOHNSON; MICHIGAN STATE MEDICAL SOCIETY; and WILLIAM E. MADIGAN, Jointly and Severally,

Defendants.

_____/

GEOFFREY N. FIEGER
(P30441)
WILLIAM J. McHENRY
(P38458)
Attorneys for Plaintiff
Fieger, Fieger, Schwartz & Kenney, P.C.
19390 West Ten Mile Road
Southfield, Michigan
48075-2463
(810) 355-5555

_____/

COMPLAINT AND JURY DEMAND

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff Jack Kevorkian, by and through his attorneys, FIEGER, FIEGER & SCHWARTZ,

P.C., and for his cause of action against Defendants, states as follows:

1. Plaintiff is a resident of the City of West Bloomfield, Oakland County, Michigan.

2. Defendant American Medical Association ("AMA") is an organization, with its principal place of business located in the City of Chicago, Cook County, Illinois, and conducting business in Wayne County, Michigan.

3. Defendant M. Roy Schwarz ("Schwarz") resides and/or conducts business within Cook County, Illinois.

4. Defendant James S. Todd, M.D. ("Todd") resides and/or conducts business in the City of Chicago, Cook County, Illinois.

5. Defendant Mark T. Wolfe ("Wolfe") resides and/or conducts business in the City of Chicago Cook County, Illinois.

6. Defendant Kirk B. Johnson ("Johnson") resides and/or conducts business within Cook County, Illinois.

7. Defendant Michigan State Medical Society ("MSMS") is an organization, with its principal place of business located in the City of Lansing, Ingham County, Michigan, and conducting business in Wayne County, Michigan.

8. Defendant William E. Madigan ("Madigan") resides and/or conducts business within Wayne County, Michigan.

9. The defamatory communications, which are the subject of this cause of action, were published within the City of Detroit, and Wayne County, Michigan.

10. The amount in controversy exceeds $10,000, exclusive of interest, costs and attorney fees.

COUNT I – DEFAMATION

11. Plaintiff adopts by reference the above paragraphs as though fully stated herein.

12. Defendants owed a duty to Plaintiff not to publish false, defamatory, libelous and/or slanderous statements about Plaintiff.

13. Defendants, jointly and severally, did publish false, defamatory, libelous and/or slanderous statements about Plaintiff, with knowledge of these falsehoods and/or with reckless disregard of whether or not these publications were false.

14. Defendants did publish these defamatory statements willfully, wantonly, and with total disregard for the injuries such wrongful statements would cause Plaintiff.

15. Defendant Johnson, acting for and on behalf of Defendant AMA, and with its express authority and consent, and Defendant AMA did publish a false, libelous and/or defamatory letter dated October 10, 1995 to Attorney General Frank Kelley, Office of the Attorney General, for the State of Michigan, and published copies to Defendants Madigan, MSMS, and other third parties.

16. The letter of October 10, 1995 (Exhibit A) was authored by Defendant Johnson in the course and scope

of his employment with Defendant AMA, utilizing its official letterhead and within his capacity as Group Vice President and General Counsel for Defendant AMA.

17. Said false, slanderous, libelous and/or defamatory statements included, but were not limited to, the following:

a. that Plaintiff "perverts the ideal of the caring and committed physician;"

b. that Plaintiff "serves merely as a reckless instrument of death;"

c. that Plaintiff "poses a great threat to the public;" and

d. that Plaintiff engages in unspecified "criminal practices."

18. On or about November 9, 1995, Defendants American Medical Association, James S. Todd, M.D. (Executive Vice President of the AMA), and Mark T. Wolfe (Public Information Officer for the AMA), issued a news release for immediate publication of false, libelous and/or defamatory statements, with knowledge that the statements were false and/or with a reckless disregard of whether or not these publications were false.

19. Said defamatory publications (Exhibit B) issued in the November 9, 1995 News Release included, but were not limited to, the following:

a. alleged "continued killings" by Plaintiff; and

b. alleged unspecified "criminal activities" by Plaintiff.

20. On or about November 10, 1995, Defendant AMA, by and through its Group Vice President for Professional Standards, and Defendant M. Roy Schwarz, published false and defamatory statements to the media, including but not limited to, a staff writer for the Detroit Free Press, with knowledge of their falsity and/or with reckless disregard of whether or not the statements were false.

21. The false and defamatory statements by Defendants AMA and Schwarz were intended to be published by the media, including but not limited to, the Detroit Free Press, for distribution throughout the United States, including Wayne County and Michigan.

22. Said false and defamatory statements by Defendants, published on or about November 10, 1995 did, in fact, appear as intended by Defendants in an article published in the Detroit Free Press on or about Saturday November 11, 1995 (Exhibit C).

23. Said false and defamatory statements by Defendants AMA and Schwarz, its Group Vice President for Professional Standards, included, but were not limited to, allegations that Plaintiff was, among other things, "a killer."

24. Said false, slanderous and/or libelous statements were, in fact, published extensively throughout Wayne County and the United States, including news print, magazines, radio, television, on-line services, and other means, with injurious consequences to Plaintiff.

25. On or after October 11, 1995, Defendants Michigan State Medical Society and William E. Madigan, its

Executive Director, acting for and on behalf of Defendant MSMS, and with its express and/or implied knowledge and consent, did publish false, slanderous and/or libelous statements about Plaintiff, with knowledge of their falsity and/or with a reckless disregard of whether these statements were false.

26. Said false and defamatory publications by Defendants MSMS and Madigan included, but were not limited to, the publication and distribution amongst Defendant MSMS, its members, and other third parties of the same false and defamatory statements concerning Plaintiff, as previously referenced herein.

27. Defendants, and each of them, published these false and defamatory statements with bad faith and ill-will.

28. On or about November 10, 1995, Plaintiff, through his attorney, Geoffrey Nels Fieger, requested that Defendants AMA, Todd, Wolfe, and Johnson issue a retraction of Defendants' false and defamatory publications, including the letter of October 10, 1995 to Michigan's Attorney General, and further, did offer Defendants a reasonable amount of time to issue said retraction.

29. Defendants intentionally refused to issue an appropriate retraction, as requested by Plaintiff, even though Defendants had knowledge of the false and defamatory nature of said publications.

30. As a direct and proximate result of these false, slanderous and/or libelous publications by Defendants, Plaintiff has suffered enormous damages, including but not limited to:

a. damage to his reputation;
b. humiliation;
c. embarrassment;
d. mental pain and anguish;
e. indignation; and
f. outrage.

31. As a further direct and proximate result of Defendants' bad faith and refusal to issue an appropriate retraction, Plaintiff has suffered increased injury to his feelings attributable to his sense of indignation and outrage caused by said defamatory publications, and Defendants' refusal to retract same.

WHEREFORE, Plaintiff requests that the trier of fact enter Judgment in the amount of Ten Million ($10,000,000) Dollars or in whatever amount it determines to be fair, just and adequate compensation for the damages sustained, including punitive and exemplary damages as allowed by MCL 600.2911, plus interest, actual costs, and attorney fees so wrongfully incurred.

Respectfully submitted,

FIEGER, FIEGER & SCHWARTZ, P.C.

BY:/s/ William J. McHenry
GEOFFREY NELS FIEGER
(P30441)
WILLIAM J. McHENRY
(P38458)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan
48075-2463
(810) 355-5555

Dated: February 9, 1996

JURY DEMAND

Plaintiff demands trial by jury in this matter.

Respectfully submitted,

FIEGER, FIEGER & SCHWARTZ, P.C.

BY:/s/ William J. McHenry

GEOFFREY NELS FIEGER
(P30441)
WILLIAM J. McHENRY
(P38458)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan
48075-2463
(810) 355-5555

Dated: February 9, 1996

EXHIBIT A

American Medical Association
Physicians dedicated to the health of America

[Name And Addresses Omitted In Printing]

[LOGO]

October 10, 1995

Frank J. Kelley
Office of the Attorney General
P.O. Box 30212
525 W. Ottawa Street
Lansing, MI 48909-0212

Dear General Kelley:

On behalf of the American Medical Association (AMA), I write today to express our concern for the continuing conduct of Jack Kevorkian, and to urge you to take the necessary steps to bring this episode to a close. I know that your office has taken action against Mr. Kevorkian's medical license, and those results are applauded. By invoking the physician-patient relationship to cloak his actions, Jack Kevorkian perverts the ideal of the caring and committed physician, and weakens the public's trust in the medical profession.

The AMA establishes the Code of Ethics for the medical profession. One of the fundamental principles of that Code is that physicians must not act with the intent of causing the death of their patients. Physician assisted suicide is simply incompatible with the physician's role as healer. When faced with patients who are terminally ill and suffering, physicians must relieve their suffering by providing adequate comfort care. This obligation is paramount: it is ethical for physicians to provide effective pain medication even if the medication may have the side effect of suppressing respiration and hastening death.

Responsible persons may have differing views concerning the propriety of physician assisted suicide. However, no civilized society should condone assisted suicide as practiced by Jack Kevorkian. Mr. Kevorkian's actions are not those of a primary treating physician. Rather, he serves merely as a reckless instrument of death. In our view, Jack Kevorkian poses a great threat to the public, and we ask you to help in bringing these criminal practices to a close.

The AMA will provide all possible assistance to you, whether in the form of expert witnesses, amicus briefs, or otherwise, as you pursue this matter.

Sincerely

/s/ Kirk B. Johnson
Kirk B. Johnson, JD

cc: William E. Madigan
Jim Tierney

EXHIBIT B

American Medical Association [LOGO]
Physicians dedicated to the health of America

News Release

FOR IMMEDIATE RELEASE

For more information, contact:
Mark T. Wolfe
Public Information Officer
(312) 464-5970

AMA OUTRAGED BY DEATH OF KEVORKIAN'S 26TH VICTIM – URGES IMMEDIATE ACTION BY MICHIGAN ATTORNEY GENERAL

CHICAGO, November 9 – With the death of Dr. Jack Kevorkian's 26th victim, and the questionable circumstances surrounding the situation, the American Medical Association (AMA) is outraged by the continued killings and the lack of an effective means of ending Kevorkian's actions.

In a recent letter from the AMA General Council to Frank J. Kelley, Attorney General of the State of Michigan, the AMA applauded the recent actions taken by the Attorney General against the medical license of Dr. Jack Kevorkian. At the same time, however, the AMA urged further action to stop Kevorkian from continuing his criminal activities and offered to provide all possible assistance, whether in the form of expert witnesses, amicus briefs or otherwise.

Expressing concern for the continuing conduct of Kevorkian, James S. Todd, M.D., AMAM Executive Vice President stated, "The AMA establishes the Code of Ethics for the medical profession. A fundamental principle of that Code is that physicians must not act with the intent of causing death of their patients. Physician assisted suicide is simply incompatible with the physicians role as healer.

"No civilized society should condone assisted suicide as practiced by Jack Kevorkian. Even where assisted suicide is permitted, Mr. Kevorkian's actions would be wrong," Todd concluded.

EXHIBIT C

• SATURDAY, NOVEMBER 11, 1995/
DETROIT FREE PRESS 7A

Kevorkian wants to sue AMA for defamation

By Jeff Martin
Free Press Staff Writer

Dr. Jack Kevorkian threatened a $10-million lawsuit against the American Medical Association on Friday after the group called him a "reckless instrument of death" and urged state officials to put an end to his assisted suicides.

In a statement Friday, the AMA urged Michigan officials to "take the necessary steps to bring this episode to a close. . . .

"By invoking the physician-patient relationship to cloak his actions, Jack Kevorkian perverts the ideal of a caring and committed physician, and weakens the public's trust in the medical profession," the AMA said.

Kevorkian's attorney, Geoffrey Fieger, said the AMA is trying to discredit his client and thus "line the pockets of their members" with money from dying patients.

A defamation lawsuit "gives us an opportunity to put them on trial," Fieger said of the AMA. He also is demanding a public apology from the professional group. Fieger wouldn't say when the lawsuit might be filed.

"That would be an interesting suit," Dr. M. Roy Schwarz, the AMA's group vice president for professional standards, said from his Chicago office. "If they can find something in there to sue over, I'd have to say, 'Have at

it.' Sometimes you have to go through a lawsuit to establish your principles and this may be one of those times. . . . We believe very strongly that you can't be a killer and a healer both."

The AMA's criticism comes after the body of Kevorkian's 26th assisted suicide, Patricia Cashman, 58, was left outside the county morgue on Wednesday.

The AMA also sought help from Michigan Attorney General Frank Kelley, asking him Friday to "take the necessary steps" to stop Kevorkian.

"We've already taken away his license to practice medicine," Deputy Attorney General Stanley Steinborn said in an interview. Kevorkian is a matter for prosecutors in Oakland County, where he faces charges in four assisted suicides, Steinborn said.

The position taken by the Michigan State Medical Society "is perhaps not quite as rigid as the AMA's, but we feel in almost every case there is a solution other than physician-assisted suicide," said Peter Duhamel, a Rochester general surgeon who serves as chairman of the state association's board of directors.

But Duhamel said the group opposes any state law that would take the decision away from patients and doctors. "We are absolutely opposed to having a legislative solution to this."

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

JACK KERVORKIAN, MD,

PLAINTIFF,

vs

AMA et al.,

DEFENDANTS.

_____/

CASE NO.
96-605162 NZ

OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session held on MAY 21 1997
PRESENT: The Hon. SHARON TEVIS FINCH.

All defendants have moved for summary disposition under MCR 2.116(C)(8), arguing that the pleadings do not state a cause of action, since the statements allegedly made about plaintiff constitute opinion on matters of public interest and not statements of fact about the individual plaintiff. Defendants rely upon the Michigan and United States Constitutions to allow the subject comments as part of free speech and the right to petition the government.[1]

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[1] Sec. 5 "Freedom of speech and of press

Every person may freely speak, write, express and publish his views on all subjects, *being responsible for the abuse of such right*; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." (emphasis added)

Michigan Const. 1963, Art. I, Sec. 5

The Court heard oral arguments and has read the briefs of the parties.

The Court finds that the statements alleged to have been published and or/republished by defendants are indeed statements of fact, not mere opinion, and their gravamen is that Plaintiff is a "criminal" who "kills" "victims".

Defendants argue that because Plaintiff admits the conduct of assisting in suicide, that thus he either admits being a "killer" and a "criminal", or that those words are mere opinion as to the nature/characterization of his conduct. The Court disagrees.

To be accused of being a "criminal" and a "killer" in the same document certainly could lead to the inference that one is a murderer, as opposed to a committer of justifiable homicide. Murder is historically among the most heinous of crimes, *malum in se*, not *malum prohibitum*. It is one of only two offenses for which bail could historically be denied, the other being treason. This allegation is so strong and so unequivocal that when directed against a specific person, it constitutes libel *per se*, and cannot be considered "opinion" on a topic of public concern. In this instance, the true topic of public concern is the issue of

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"Amendment I. Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise, thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

US Const., 1st Amendment, extended to the states by the 14th Amendment.

assisted suicide and its permissibility, not whether or not Plaintiff is a "criminal".

Defendants apparently believe that because plaintiff has been charged with murder, that it must be true that he is a murderer. This belief overlooks the fact that he has not been convicted of this crime.

These statements were allegedly made in press releases and otherwise, in conjunction with communications with the Michigan Attorney General. Defendants argue that these statements are privileged because they were made as part of every citizen's right to petition the government. It is certainly not necessary to issue a press release to communicate with the government. The purpose of a press release is to communicate with the press and other media so the substance of the release can be published.

Defendants further argue that their First Amendment rights are violated if such statements are prohibited. The Court disagrees.

The parties have an absolute right to make any statement they wish, including those in question, and cannot be enjoined in their speech, so long as they do not shout "fire" in a crowded theater.[2] This is free speech. However, "free" though speech may be, it can still carry a price tag. The First Amendment does not guarantee that one will be safe from suit for libelous statements. This is not an improper "chilling" of rights, but rather the thoroughly constitutional check and balance of the right to speak as one wishes. It leaves individual responsibility with the

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[2] Schenck v. US, 249 U.S. 47, 39 S.Ct. 247 (1919)

speaker to be judicious in his expression if he wishes to avoid lawsuits for defamation, rather than letting the government pre-judge communication.

The Court finds that the speech complained of is not constitutionally protected against this defamation action.

IT IS HEREBY ORDERED that Defendants' Motions for Summary Disposition be and they are DENIED.

SHARON TEVIS FINCH
SHARON TEVIS FINCH
Circuit Judge

/s/ [Illegible]

Copies mailed to counsel of record by np on 5/21/97.

Order

Michigan Surpreme Court
Lansing, Michigan

Entered: May 23, 2000

Elizabeth A. Weaver,
Chief Justice

115338
115339

[Justices Omitted In Printing]

JACK KEVORKIAN, M.D.,

Plaintiff-Appellant,

v

AMERICAN MEDICAL ASSOCIATION, M. ROY SCHWARTZ, JAMES S. TODD, M.D.; MARK T. WOLFE, KIRK B. JOHNSON, MICHIGAN STATE MEDICAL SOCIETY AND WILLIAM E. MADIGAN,

Defendants-Appellees.

SC: 115338-9
COA: 203985, 204049
Wayne CC: 96-605162-NZ

On order of the Court, the application for leave to appeal from the August 6, 1999 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

Taylor and Markman, JJ., not participating.

d0518 [SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 23, 2000 /s/ Corbin R. Davis
Clerk

Order Michigan Supreme Court
Lansing, Michigan

Entered: November 29, 2000 Elizabeth A. Weaver,
Chief Justice

115338-39 (76) [Justices Omitted In Printing]

JACK KEVORKIAN, M.D.,

Plaintiff-Appellant,

v

AMERICAN MEDICAL ASSOCIATION, M. ROY SCHWARTZ, JAMES S. TODD, M.D.; MARK T. WOLFE, KIRK B. JOHNSON, MICHIGAN STATE MEDICAL SOCIETY AND WILLIAM E. MADIGAN,

Defendants-Appellees.

SC: 115338-9
COA: 203985, 204049
Wayne CC: 96-605162 NZ

On order of the Court, the motion for reconsideration of this Court's order of May 23, 2000, is considered, and it is DENIED because it does not appear that the order was entered erroneously.

Kelly, J., would grant reconsideration.

Taylor and Markman, JJ., not participating.

a1121 [SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme

Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 2000 /s/ Corbin R. Davis
Clerk